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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. [redacted]237

LUTHER WEEDIN, COMMISSIONER OF IMMIGRATION at the Port of Seattle, Washington, Petitioner

v.

CHIN BOW

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF GIBSON BROS., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 791

LUTHER WEEDIN, COMMISSIONER OF IMMIGRATION at the Port of Seattle, Washington, Petitioner

v.

CHIN BOW

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The matter presented on behalf of petitioner by the Solicitor General, in his brief in support of the petition herein, under the first five headings thereof calls for no particular comment; and this brief is addressed to his "ARGUMENT," pages 9-18, and is arranged under three headings similar to his. But, before taking up this argument, attention should be directed to the fact that *all*

DECISIONS OF THE LOWER COURTS

so far rendered have been to the same effect as those rendered below in the present case, and that the *exact question* which the Government here seeks to bring before this Court *is now pending before the Circuit Court of Appeals for the First Circuit*. In the case entitled "In re Dea Gim Moy, John G. Sullivan, Petitioner, Civil No. 2813," the District Court for the District of Massachusetts (Lowell, J.) held

on December 11, 1924, that a child of Chinese descent, the facts with respect to whom were exactly like those of the instant case, was entitled to enter the United States as a citizen thereof by virtue of the terms of Section 1993, Revised Statutes. The Government appealed and in the Circuit Court of Appeals, First Circuit, the case is recorded as "No. 1889, October Term, 1924, John P. Johnson, U. S. Commissioner of Immigration, Respondent, Appellant, v. Dea Gim Moy, Petitioner, Appellee." On October 21, 1925, that case was argued for the Government (by the Assistant United States Attorney at Boston) and for the petitioner, appellee (by the writer), and lengthy briefs were submitted on both sides. The case is still under consideration by said Court.

From the above it will be seen that so far all judicial opinion upon the question now sought to be brought before this Court is to the same effect and contrary to the contentions of the petitioner herein; and that it is reasonable to expect that another Circuit Court of Appeals will express a detailed opinion at an early date.

ARGUMENT.

I.

The purpose of Congress and the wording of the act support the construction that the residence prescribed *need not* occur prior to the birth of the foreign-born children.

The history and evolution of the several statutes bearing upon the question here sought to be raised, antedating and leading up to Section 1993, Revised Statutes, are completely and concisely described in the decision of this Court in *United States v. Wong Kim Ark*, 169 U. S., 649, at pages 672-674. Several important things with respect to such legislation are there disclosed.

(a) It is perfectly apparent that the purpose of Congress when enacting the statute of February 10, 1855 (10 Stat.

L. 604), the immediate forerunner of Section 1993, was to make certain that the rights of citizenship would be preserved to the foreign-born children of American citizens, whether the fathers of such children had been citizens before the passage of the law, or were such at the time of its passage, or might become such after is passage. (Its purpose is also disclosed by the very title of the 1855 Act, to wit, "An Act to secure the rights of citizenship to children of citizens of the United States born out of the limits thereof.")

(b) Prior to 1855, the law covering the subject was the Naturalization Act of 1802, which was retrospective throughout. In re-enacting the law in 1855, it was made prospective as well as retrospective. As the main clause of the provision as it appeared in the 1802 statute was retrospective, of course it was necessary that in that statute the qualifying clause should also be so worded as to look backward. Hence the appearance in the qualifying clause in that statute of the expression "*have* never resided." And when the law was being re enacted and the main clause thereof made prospective as well as retrospective, it was necessary correspondingly to change the qualifying clause. Hence, the use in the qualifying clause as it appears in the Act of 1855 and in its successor, Section 1993, of the words "never resided," the word "have" qualifying the tense of the clause as it appeared in the 1802 statute being omitted from the revision.

(c) What Congress had in mind in 1802 was enacting a statute both the main and qualifying clause of which would be retrospective; what it had in mind in 1855 was enacting a statute of which both the main and the qualifying clause would be prospective as well as retrospective; and on both occasions, when selecting appropriate words in which to state both the main and the qualifying clause, Congress obviously had in mind, first, making the law retrospective

only, and both retrospective and prospective, respectively, from *the time of the passage of the law, not from the time of the birth of the children*, and, second, that the children's rights of citizenship should be preserved under the first statute if their fathers *had ever* resided in the United States before its passage, and under the second statute if their fathers *ever* resided in the United States *either before or after the passage of that statute*.

At a glance it can be seen that there are two words in the qualifying clause of Section 1993 the exact meaning of which, as there used by Congress, must determine the meaning of the entire provision, to wit, the word "descend" and the word "never."

The Court below devoted some consideration to the meaning of the word "descend," going to Webster's Unabridged Dictionary for an acceptable definition. If the decision below is taken in its entirety, it at once becomes apparent that the Court did not intend to be understood as holding that the word as here used means the acquirement of citizenship by descent in the sense that an heir inherits from an ancestor, but held rather that the word was used in the sense of "to pass down from generation to generation;" otherwise it would not have cited as authority for its holding certain passages from the decision of this Court in the Wong Kim Ark case, nor summarized its decision in the manner in which it did. If the word is given that sense, the citizenship attaches, not at the time of the death of the father, but at the instant of the birth of the child to the American citizen father—attaches with a qualification or condition, it is true, but attaches nevertheless, and becomes absolute when the condition is met.

And the meaning of, and the purpose of Congress in using, the word "never" would seem to be of equal importance. Never, by derivation, means not ever; and in Funk and Wagnall's Standard Dictionary this definition is found:

"Not ever; not at any time, neither in the past, present, nor future, or referring either to the past or the future, as, better late than never."

No matter which of the three separate clauses of the above definition should be substituted in the provision of law under consideration for the word "never," the sense would remain the same; to wit, that the rights of citizenship shall not descend to the foreign-born child of a citizen unless the father has been a resident of the United States in the past, is a resident of the United States at the present, or becomes a resident of the United States in the future.

If Congress had not intended that such children should be regarded as American citizens, whether their fathers' residence in the United States antedated, was coincident with, or postdated the birth of the children, Congress certainly would not have selected for incorporation in this provision a word which necessarily carries the inference of past, present, or future occurrence; but would simply have said: "The rights of citizenship shall not descend to children whose fathers *have not* (not *not ever*) resided in the United States." Or Congress could easily have added at the end of the qualifying clause the words "prior to the birth of such children;" or could have worded and arranged the entire provision in the manner in which it is now contended on behalf of petitioner that the "statute may be read." (Petitioner's brief, p. 13.)

Moreover, it is *especially* to be doubted that Congress, when passing the 1855 Act with the object (as explained by this Court) of making sure that the rights of citizenship were preserved for the past, for the present, and for the future, in the case of children born abroad to American fathers, would have used the broad word "never," instead of the simple and narrow word "not," when of course Congress knew that the word "never" runs to the past, the present, and the future, unless it had been the intention that

the law should be applied in such a manner as to produce the complete and natural consequences of the use of so broad a word.

That persons born under circumstances of the kind existing with respect to the child involved in the case now sought to be brought before this Court, and also with respect to that child's father, are born into a state of dual citizenship, from the international point of view, was fully discussed by this Court in the Wong Kim Ark case. It has been conceded generally, both in England and in this country, that statutes like 25 Edw. III and Section 1993 of the Revised Statutes can not be enforced against claims of the foreign countries where the birth of the child occurs that all persons born within their dominions are their citizens. And this situation, limiting its own powers, was doubtless in the mind of Congress when it attached to Section 1993 the qualifying clause.

But Congress had another purpose, which is quite obvious, namely, "to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties." (*Citizenship of the United States*, Van Dyne, p. 34.)

Measuring the child's case by these reasons for the statute, the following can be seen at a glance: The question now to be determined has no international phase. The child's father has completely taken himself out of his international situation of dual citizenship by coming to this country and placing himself fully and solely under its jurisdiction. The child, also, is now doing the same things; so that no question of duality of citizenship exists with respect to him. And the main thing which the law was intended to prevent, as so tersely expressed by Mr. Van Dyne, is being completely prevented here with respect to both father and child—the former has already placed himself in a situation where he assumes, or, if need be, could be compelled to assume, all the duties of citizenship; and the child,

in the very act of applying for admission, places himself in a similar situation.

The accomplishment of the purposes which Congress had in view, therefore, does not require that Section 1993 shall be construed in the manner for which petitioner contends.

The work of Mr. Borchard, cited in petitioner's brief (p. 11), deals with "Diplomatic Protection of Citizens Abroad," and, for reasons stated in some detail hereinafter, should not be regarded as authoritative in a case which relates to the bare law question of citizenship entirely divorced from the administrative and discretionary matter of affording diplomatic protection to citizens who live in foreign countries.

It may be conceded, perhaps, that it is an ill-advised law which permits persons born abroad to American fathers to remain in a foreign environment until they have matured physically and mentally and their ideas, political or otherwise, have become fixed, and they meantime have not even learned the language of the country of which they claim to be citizens, and then to enter the United States, where, so far as their actual assimilation into the body politic is concerned, they are practically foreigners in our midst. But, if the law is defective, the remedy is with Congress. And, in this connection, it must not be forgotten that the question at issue is not confined to the rights of persons of Chinese descent, but affects in many ways the rights of foreign-born children of all American citizens. Moreover, this same situation exists, and has always existed unremedied by Congress, with respect to children born abroad to native-born American citizens (those belonging to the second generation, not to the third as in this case); and when the Secretary of Labor some years ago attempted to meet such situation by promulgating certain regulations, the Attorney General held that Section 1993 confers an absolute status of citizenship upon such foreign-born children, and that, in effect, the Secretary of Labor could not remedy

the situation of which he complained otherwise than by securing additional legislation. 30 Opinions Attorney General, 529.

II.

The Act of 1907 is not in pari materia with Section 1993, Revised Statutes, in such a sense as to make it **a legislative declaration by Congress that the residence prescribed must occur prior to the birth of the foreign-born children;** *and both acts can be given effect without adopting the construction for which petitioner contends.*

Perhaps no better answer could be made to the contentions set forth under the second heading of the Argument contained in petitioner's brief than that given in the learned and exhaustive opinion of the Attorney General to which reference has already been made. 30 Opinions, 529. Clearly the thorough investigation and painstaking study and analysis of the Act of March 2, 1907, entitled "An Act in reference to the Expatriation of Citizens and their Protection abroad" (34 Stat. L., 1229), which resulted in the handing down of that opinion, did not lead the Attorney General to conclude that the said Act had any of the same objects as Section 1993; but, rather, impelled him irresistibly to the conclusion that they were laws of a different nature with separate and distinct purposes. And the "unreported" court decisions to which he referred (p. 532), as decisions which "should not be overlooked," have since been reported and are *Ex parte Ng Doo Wong*, 230 Fed., 751; *Ex parte Wong Fan*, 230 Fed., 814; and *Ex parte Lee Dang Wan*, 230 Fed., 746. See also *Ex parte Leong Wah Jan*, 230 Fed., 540; *Ex parte Tom Tay Tin*, 230 Fed., 747, 749, 750; and *Quan Hing Sun* v. *White*, 254 Fed., 402, 406.

The Act of March 2, 1907, *supra*, was passed at the request of the Department of State with a view of relieving that Department of certain embarrassments which

it was encountering in our diplomatic relations, arising from the fact that persons born abroad whose fathers were American citizens, and who remained abroad continuously and long after reaching their majority, were claiming protection and applying for passports by virtue of their citizenship under Section 1993, although they were regarded by the countries in which born as citizens of such countries. H. of R. Document No. 326, 59th Cong., 2d Sess.; 30 Opinions Attorney General, 529, 534–535. The requirements thereof with regard to declaring intention to remain citizens and taking the oath of allegiance plainly under the terms of the statute were requirements to be met in order for the foreign-born citizen to be in a position to claim protection. Failure to observe them could not result in the expatriation of the persons guilty of the failure; but resulted merely in relieving the Department of State of any obligation to afford them diplomatic protection. 30 Opinions Attorney General, 529, 535–537. A law with purposes so distinct from the purposes of the statute here under consideration it is not believed can properly be regarded as "in pari materia" with it in any such sense as would support petitioner's argument.

Moreover, as seems apparent even from the decisions cited in petitioner's brief (p. 14), in order for subsequent legislation to be regarded as "a legislative declaration" of the meaning of a statute, it must clearly appear that the legislative body actually had in mind the placing of a construction upon the particular part of the previous law involved. Legislatively expressed opinions are not binding upon the courts, although always entitled to high respect. *Genesee Chief* v. *Fitzhugh*, 12 How., 443, 458. The practical construction of a constitutional provision by legislative action is entitled to no force except in cases of doubt. *Fairbank* v. *United States*, 181 U. S., 283, 306–311. See also *Stuart* v. *Union Pacific R. Company*, 227 U. S., 342, 350–351; *Jordan* v. *Roche*, 228 U. S.,

436, 445–446; *Koshkonong* v. *Burton*, 104 U. S., 668, 678–679.

III.

Great weight should be given the construction by the executive department charged with the execution of section 1993 *in its relation to a right of entry into the United States.*

The Department of Labor is the executive department charged with the enforcement of Section 1993 in the matter of determining whether persons applying for admission to the United States are citizens or aliens and, if the latter, are admissible, and is the only department that has occasion to pass upon the question of law involved here.

The Department of State in the discharge of its discretionary administrative duties with regard to the protection of United States citizens in foreign countries is not put to the necessity of passing upon such question of law. All it has to do is to determine whether, under the facts of particular cases, it will or will not exercise its discretion favorably. See 30 Opinions Attorney General, 529, 533, 536–537, and authorities there cited. That department, moreover, appears not to have been altogether consistent, when exercising its discretion, under the provisions of Section 1993. *Diplomatic Protection of Citizens Abroad*, Borchard, Secs. 270 and 333, pp. 609, 709–710; 30 Opinions Attorney General, 529, 533.

The practice of the Department of Labor—the executive department directly concerned—*does not* support petitioner's contention.

It is stated in petitioner's brief (p. 17) that "Until recently the Department of Labor has never had occasion to rule directly upon the residence prescribed in Section 1993, inasmuch as children in the position of the respondent were admitted to the United States as minor children of American citizens prior to the Immigration Act of

1924." This statement is based upon partial misapprehension. It is true that the Department of Labor never, until after the passage of the Immigration Act of 1924, issued any formal instructions or rendered any formal decision to the effect that foreign-born children should be recognized as citizens only if their fathers had resided in the United States prior to the children's birth. *But it is not true that such children were*, prior to the passage of the 1924 Act, "*admitted to the United States as minor children of American citizens.*" As is well known to all having any extended practical experience in the administration of the Chinese-exclusion laws, it never occurred to the department until after the passage of said act that such children, *majors or minors*, might be subject to exclusion as aliens; and no instructions to the contrary ever having been given by the department, numbers of such children were admitted at the various ports of entry *as citizens*. To demonstrate this it is only necessary to refer to the official reports of the Department of Labor covering recent years. Examination, for example, of the Annual Report of the Commissioner General of Immigration for the fiscal year 1924 (p. 154) shows that in Table 1, entitled "Chinese seeking admission to the United States, fiscal year ended June 30, 1924, *by classes* and ports," Chinese applicants are divided into fifteen classes, six of which are *United States citizens, wives of United States citizens*, section 6 merchants, returning merchants, *merchants' wives, merchants' children*. There is *no separate classification of children of United States citizens*. Why? Obviously because they were being regarded by all concerned and admitted by the Immigration officials, irrespective of place *or time* of birth, *or age, as United States citizens*. The same classification is followed in Table 2 (p. 156); and while Table 3 (p. 157), concerning "Chinese claiming American citizenship by birth, or to be the wives or children of American citizens," separates the citizens into "native born" and "foreign

born children of natives," a simple calculation will show that the total of those two segregations is embraced within the total number of United States citizens given in the other tables—further confirmation of the fact that *all foreign-born children of citizens have been admitted as citizens*.

Furthermore, the contentions made by petitioner with regard to the requirements with respect to registering, etc., contained in the Act of March 2, 1907, do not seem to be sound. All of the children covered by Section 1993 (those falling under the qualifying as well as those falling under the main clause thereof) are *born citizens* in the broad sense, and the only difference between those whose citizenship arises under the main and those whose citizenship arises under the qualifying clause is that the latter have a condition or qualification attached to their citizenship, whereas the former are born into an unqualified state of citizenship.

Nor is it apparent why children of the third generation could not, pursuant to the 1917 Act, register and take the oath of allegiance. They would have a perfect right to do both if their fathers had, prior to their reaching the respective prescribed ages, become residents of the United States, and even if their fathers had not at such times already become residents, the registration of the children and the taking of the oath of allegiance by them would not lift the qualification from their citizenship, but it would be necessary for their fathers, nevertheless, to come to the United States before such children would be in a position to exercise the rights of citizenship themselves.

CONCLUSION.

In view of all the foregoing, it is respectfully submitted that the petition for a writ of certiorari should not be granted.

A. Warner Parker,
Attorney for Respondent.

Since the foregoing brief was printed, the Circuit Court of Appeals for the First Circuit has handed down a decision in the Dea Gim Moy case, cited on page 2, which decision reads as follows:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1925.

No. 1889.

JOHN P. JOHNSON, U. S. COMMISSIONER OF IMMIGRATION,
RESPONDENT, APPELLANT,

v.

JOHN G. SULLIVAN, EX REL. DEA GIM MOY,
PETITIONER, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

OPINION OF THE COURT.

NOVEMBER 16, 1925.

BINGHAM, J. This habeas corpus case involves a single question,—whether Dea Gim Moy is an American citizen. His grandfather, Dea Quong Jew, was an American citizen, born in this country. His father, Dea Len Suey, was born in China, and there remained until 1923, when he came to this country, where he has since resided. His citizenship is conceded. The appellee, Dea Gim Moy, was born in China, October 16, 1907. On his arrival at Boston on July 6, 1924, to join his citizen father, he was excluded by the immigration authorities on the ground that he was not an American citizen.

The case turns on the construction of R. S. Section 1993, which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The immigration authorities ruled that, as Dea Gim Moy's father had not at the time of the applicant's birth resided in the United States, the applicant was an alien and therefore inadmissible under the Immigration Act of 1924.

The court below ruled that the applicant had the right to enter the United States under the terms of this section, and the Commissioner appealed. We think the decision below is right, and that the judgment should be affirmed.

This exact question was before the Court of Appeals for the Ninth Circuit in *Weedin* v. *Chin Bow*, and that court, in an opinion filed August 3, 1925, 7 Fed. (2d), *369*, reached the same conclusion as did the court below. A like result was reached by the Supreme Court of Iowa in 1876 in *State* v. *Adams*, 45 Ia. *99*. No decision to the contrary is cited or known to this court.

A leading case on citizenship, its basis and incidents, is *United States* v. *Wong Kim Ark*, 169 U. S. 649. On pages *672-674* of that learned opinion by Mr. Justice Gray are stated the origin and history of R. S. sec. 1993.

This statute was, in a slightly different form, enacted by our first Congress,—Act of March 26, 1790, chap. 3, 1 Stat. 415. It took its present form in 1855, 10 Stat. *604*. It is no part of our Chinese Exclusion laws; the policy of those laws throws no light on its proper construction. It must be construed in its general relation to American born citizens who, for business or other reasons, are on foreign soil when their children are born. It undertakes to extend the rights of citizenship to the foreign-born descendants of native-born citizens,—a limited recognition of the doctrine of *jus sanguinis* as distinguished from *jus soli*. Com-

pare 169 U. S. 691, Cockburn Nationality 7. But if the second generation is permanently non-resident, such citizenship by descent ceases. Compare 169 U. S. 714. If Congress had intended citizenship should only descend to children whose fathers had had prior residence in the United States, it would naturally have made the proviso read:

"But the rights of citizenship shall not descend to children whose fathers had not resided in the United States prior to the birth of such children."

The judgment of the District Court is affirmed.

Respectfully submitted:

A. WARNER PARKER,

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